Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALACARE HOME HEALTH SERVICES, INC.,
Petitioner,

v.

GADSDEN REGIONAL MEDICAL CENTER, formerly
BAPTIST HOSPITAL OF GADSDEN, INC.,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

ALVIN T. PRESTWOOD *
VOLZ, PRESTWOOD, HANAN
& SIZEMORE
350 Adams Avenue
Montgomery, AL 36104
(334) 264-6401
Attorney for Petitioner
* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether there exists a viable federal question for review by this Court.

2. Whether the decision of the Alacare Certificate of need ("CON") Review Board regarding the Alacare project was arbitrary and capricious, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Plaintiff:

Alacare Home Health Services, Inc.
(no parent corporation or subsidiaries)

Respondent/Defendant:

Quorum Health Care Management, Parent Corporation:

Gadsden Regional Medical Center (formerly, Baptist Hospital of Gadsden, Inc.)

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORT OF OPINIONS

The Supreme Court of Alabama denied the Petition for Writ of Certiorari to the Court of Civil Appeals filed by Alacare Home Health Services, Inc. ("Alacare") on February 3, 1995. *See* A-54a. The Court of Civil Appeals decision, from which this appeal is taken, is *Alacare Home Health Services, Inc. v. Baptist Hospital of Gadsden, Inc.*, 1994 WL 182001, —— So.2d —— (Ala. Civ. App. 1994), *cert. denied*, —— So.2d —— (Ala. 1995). A-1a.

GROUNDS FOR JURISDICTION

The decision being reviewed by this Court is the judgment of the Court of Civil Appeals of Alabama, dated May 13, 1994. The Court of Civil Appeals of Alabama

denied rehearing on June 17, 1994. The Supreme Court of Alabama denied petitioner Alacare's writ of certiorari to that court on February 3, 1995, which denial gave rise to this petition.

This Court has jurisdiction over the present case under 28 U.S.C. § 1257(a) of the United States Code. Supreme Court Rule 10.1(c) also states that jurisdiction is proper "when a state court . . . has decided an important question of federal law in a way which conflicts with the applicable decisions of the Court."

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED HEREIN

Amendment XIV of the Constitution of the United States, the State of Alabama Code of 1975 § 22-21-260 *et seq.*, and the regulations governing the award of applications of Certificate of Need, compiled in the Alabama State Health Planning Agency ("SHPA") Administrative Code (revised 1994) ("SHPA Rules"), as promulgated by SHPA, which are relevant to this case, are set out in the appendix hereto.

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STATEMENT OF THE CASE

This cause of action involves the arbitrary and capricious nature of the Alabama CON Review Board's method of awarding CONs, which violates the petitioner's constitutional right to due process protections afforded by the Fourteenth Amendment to the United States Constitution. *See*, A-78a. The case originated as a CON matter, dealing with the health planning and development scheme under which Alabama health care providers operate. SHPA is the state agency which develops and administers the state's CON program. Any entity or person is required to obtain a CON before acquiring, constructing, or operating a new institutional health care service or facility. § 22-21-260 *Ala. Code* (1975).

Baptist and Alacare filed competing CON applications in March of 1991. Baptist sought to establish a new home health agency in Etowah county, whereas Alacare sought to expand its existing home health agency into Etowah county. (An intervening party was involved at this stage of the process, however, that party withdrew and is not relevant for purposes of this Court's review). The applications in consideration were batched for comparative review at the December 3, 1991 board meeting. Each applicant presented its case, and the Board then voted to decide which entity would receive the CON award. Alacare's application was denied at that time in favor of Baptist. A-63a.

Alacare timely filed a request for reconsideration of the Board's ruling on December 24, 1991. At the next meeting of the Board, on January 1, 1992, the Board failed to establish a quorum to consider the merits of Alacare's claim, and thus the request was deemed denied. Thereafter, on January 17, 1992, Alacare filed a timely request for a fair hearing regarding the Alacare and Baptist CON proposals. Fair Hearing Officer Mark D. Wilkerson was assigned by SHPA, and the parties stipulated that the hearing officer was to make his deci-

sion based on the record and written pleading submitted by the parties up to that point.

After a thorough review of the complete record, the fair hearing officer ruled that the Board's findings were not supported by the record and ordered the Board's decision reversed, denying Baptist's CON application and granting Alacare's CON. A-62a. The hearing officer further found that the Board, in making its decision, had deviated from standard procedures routinely applied by the Board, which deviation was held to be arbitrary and capricious in nature. A-62a.

About July 20, 1992, Baptist filed its petition for judicial review of SHPA's final decision with the circuit court of Etowah County, Alabama. After the parties briefed the pertinent issues for review, particularly the issue of the arbitrary and capricious nature of the Board's actions, the court entered its ruling on June 10, 1993. In his memorandum opinion, which was largely adopted from a proposed opinion submitted by Baptist, Judge William Rhea ruled that the Board's original decision granting Baptist's CON was reasonable, not arbitrary and capricious. A-5a. The circuit court held that the Board did use fixed standards in its decision, which provide the justification for the Board's selecting Baptist as the "most appropriate applicant." A-33a, 36a. The court also held that the fair hearing officer exceeded the proper scope of review in his finding that the Board had used standards which deviated from its normal criteria and method of choice. A-7a, 33a. The circuit court found clear error with the fair hearing officer's decision and reversed that order in favor of awarding Baptist a CON. After Alacare filed a motion for reconsideration and clarification, on June 24, 1993 the circuit court issued an order clarifying his judgment and issuing an injunction specifically allowing Alacare to operate should it appeal that judgment.

Alacare timely perfected an appeal in the Alabama Court of Civil Appeals, and on May 13, 1994 the ap-

pellate court affirmed the circuit court opinion. A-1a. In that decision the appellate court held that the Board's action in deviating from its normal criteria was not arbitrary, but was within the Board's discretion, and was thus reasonable. A-4a. The court further held that the final SHPA decision by the fair hearing officer should be set aside because the hearing officer erroneously gave considerable weight to the cost factor over the accessibility factor.

Alacare filed a timely application for rehearing, which the Court of Civil Appeals denied on June 17, 1994. A-53a. Thereafter, the petitioner filed a petition for writ of certiorari with the Supreme Court of Alabama. That petition was denied on February 3, 1995, after which time the petitioner filed notice with the circuit court of Etowah County that it intended to petition this Court for a writ of certiorari to the Supreme Court of Alabama.

The federal question for review before this Court is that of the Board's arbitrary deviation from fixed review standards, which action Alacare contends violates principles of substantive due process as protected by the Fourteenth Amendment. The question of the Board's arbitrariness originated and was first raised by the petitioner at the administrative level upon fair hearing review and thereafter at each level. The issue was raised and discussed in the SHPA fair hearing final order and the circuit court and the appellate court opinions.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS CASE AND MAY APPROPRIATELY DECIDE THE QUESTION PRESENTED FOR REVIEW

The threshold issue which petitioner raises before this Court is whether the decision of the Board in denying the Alacare CON, while emphasizing different standards than with CON applications of other facilities, was violative of principles of due process under the law. Alacare contends that the Board granted the CONs of three other facilities using the mandatory fixed set of standards which it does consider, but in deciding between Alacare's and Baptist's applications, the Board, without reason, used a differently prioritized set of standards than with the prior applications. That arbitrary deviation from the fixed review standards caused the Board to conclude that Baptist was the "most appropriate applicant," thus awarding the CON to Baptist. Alacare contends that had the Board used its fixed set of standards, the Board would have only been able to select Alacare as the most appropriate application. That arbitrary and capricious use of different, inconsistent standards for deciding between competing CON applicants by the Board violates the due process rights of the petitioner, Alacare. The constitutional question of due process violations, therefore, is the question which gives this Court jurisdiction to review the petitioner's case.

A. The Federal Question Was Properly Presented

This Court has held that, in order for the Court to assume jurisdiction over a case, the federal question presented in that case must be "either raised or squarely considered and resolved in state court." *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983). In the present case, the petitioner has raised, and the lower courts have thoroughly discussed, the issues of arbitrariness and capriciousness. The petitioner understands that it bears the burden of persuading this Court of its jurisdiction over

this petition absent any express reference in the opinion of the court below to the federal constitutional provision upon which the petitioner relied in that court. *Gates*, 462 U.S. at 218-220.

In the final stage of the administrative agency's review, at the fair hearing, Hearing Officer Mark D. Wilkerson concluded that the CON Review Board's decisions were unreasonable, arbitrary and capricious, and due to be set aside. *See*, A-55a. That finding by the fair hearing officer is the final decision of the agency according to § 22-21-275(4) of the Alabama Code of 1975, and is afforded a presumption of correctness, unless found clearly erroneous upon review. *Methodist Homes for the Aging Corp. v. Stewart*, 594 So.2d 161 (Ala. Civ. App. 1992); *State Health Planning and Resource Development Admin. v. Rivendell*, 469 So.2d 613 (Ala. Civ. App. 1985). At every stage of the proceedings below the arbitrariness of the Board's decision was briefed by the petitioner and discussed by the courts. Although the petitioner acknowledges that it did not mention specifically the substantive due process clause in its argument, still the Fourteenth Amendment prohibition against arbitrary and capricious government action was and remains the basis of the argument at issue in the instant case.

Upon judicial review of the final agency decision, the circuit court found that the fair hearing officer exceeded the scope of review of the Board ruling. *See*, A——a, circuit court memorandum opinion. However, the court acknowledged that it was properly within the scope of review for the hearing officer to consider "whether SHPA made an arbitrary or capricious decision, or abused its discretion in deciding among competing applications. . . ." *Alacare Home Health Services, Inc. v. Baptist Hospital of Gadsen, Inc.*, 1994 WL 182001, —— So.2d —— (Ala. Civ. App. 1994), *cert. denied*, —— So.2d —— (Ala. 1995). A-2a. SHPA *Rules*, § 410-1-8-.22(a)(2). A-92a. The circuit court went on to refute at length the hearing officer's finding of arbitrariness, stating that

"a decision is not arbitrary where there is a reasonable justification for the decision or where the determination is founded upon adequate principles or fixed standards." *Sexton v. Tuscaloosa County Civil Service Bd.*, 426 So.2d 432, 435 (Ala. Civ. App. 1983) (emphasis in original).

The Alabama Court of Civil Appeals affirmed the opinion of the circuit court, finding that it was within the Board's discretion to weigh "the accessibility factor over the cost factor." *Alacare*, 1994 WL at *2. The Court of Civil Appeals thus held that the action of the Board in deviating from the usual weights of standards used for different CONs was not arbitrary or capricious, nor erroneous. *Id.* That same court later overruled petitioner's application for rehearing in this case.

B. The Supreme Court of Alabama Has Consistently Entertained Issues That Were Not Timely or Directly Raised

The Supreme Court of Alabama has on at least seventeen separate occasions entertained issues not timely or directly raised by petitioners.[1] *E.g., Central of Georgia R. Co. v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971).

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[1] The Supreme Court of Alabama has routinely entertained constitutional and statutory questions which were either not timely or not directly raised. *See, Aetna Life Ins. Co. v. Lavoie*, 45 U.S. 813 (1985); *Brown Mech. Contractors, Inc. v. Centennial Ins. Co.*, 431 So.2d 932 (Ala. 1983); *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So.2d 415 (Ala. 1983); *Chapman v. Rivers Const. Co.*, 284 Ala. 633, 227 So.2d 403 (1969); *City of Troy v. McClendon*, 279 Ala. 553, 188 So.2d 281 (1966); *Goodyear Tire & Rubber Co. v. Downey*, 266 Ala. 344, 96 So.2d 278 (1957); *Patterson v. Gaines*, 264 Ala. 184, 85 So.2d 893 (1956); *Lloyd v. Stewart*, 258 Ala. 627, 64 So.2d 884 (1953); *Childress v. Younger*, 258 Ala. 219, 61 So.2d 808 (1952); *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So.2d 174 (1950); *Atlanta, Birmingham & Coast R. Co. v. Cary*, 250 Ala. 675, 35 So.2d 559 (1948); *Carter v. Carter*, 247 Ala. 409, 24 So.2d 759 (1945); *Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934); *Dent v. Foy*, 210 Ala. 160, 97 So. 627 (1923);

The erroneousness of the Board's decision based on its arbitrariness was raised and ruled upon at each level of review, and the unconstitutionality of that decision is expressly raised now upon this petition. The issue of the unconstitutionality of the Board's actions is simply an enlargement of the "arbitrary and capricious nature" argument which has been considered throughout this cause of action. *Accord, Dewey v. Des Moines,* 173 U.S. 193, 197-98 (1899). Further, no state statute or rule of court procedure in Alabama prohibits the raising of new questions at least as late as the Application for Rehearing after a ruling by the Alabama Supreme Court has been issued. Therefore, the issue of whether questions can be considered by the Alabama Supreme Court that are not timely or directly raised is established by the actual practice and decisional law of that court. *Accord, Hathorn v. Lovorn,* 457 U.S. 255, 263 n.13 (1982).

The court below has, over the years, heard and ruled upon various new questions that were arguably untimely.[2]

Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 68, 87 So. 205 (1920); *New York Life Ins. Co. v. Reese,* 201 Ala. 673, 79 So. 24 (1918); *Lawrence v. Jones,* 37 Ala. 388 (1861).

[2] *Louisville & Nashville R. Co. v. Western Union Telegraph Co.,* 195 Ala. 124, 71 So. 118 (1916); *Dunn v. Dean,* 196 Ala. 486, 71 So. 709 (1916); *Copeland v. Pope,* 198 Ala. 257, 73 So. 490 (1916); *Gibbons v. Gibbons,* 205 Ala. 636, 88 So. 833 (1921); *Martin Building Co. v. Imperial Laundry Co.,* 220 Ala. 90, 124 So. 82 (1929); *Consolidated Coal Co. v. State,* 236 Ala. 489, 183 So. 650 (1938); *Huie v. Smith,* 236 Ala. 516, 183 So. 661 (1938); *Federal Land Bank of New Orleans v. Williams,* 237 Ala. 318, 186 So. 689 (1939); *Dodson v. Beaird,* 237 Ala. 587, 187 So. 862 (1939); *Sisson v. Swift,* 243 Ala. 289, 9 So.2d 891 (1942); *Goodgame v. Dawson,* 242 Ala. 499, 7 So.2d 77 (1942); *Rudolph v. Rudolph,* 251 Ala. 317, 36 So.2d 902 (1948); *Howell v. Roueche,* 263 Ala. 83, 81 So.2d 297 (1955); *Bienville Mortgage Corp. v. Mayo,* 286 Ala. 675, 245 So.2d 819 (1971).

Several cases stand as examples of the court's willingness to rule upon issues that are not timely or directly raised. *See, Lovett v. Uptain,* 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub. nom. Ex Parte Lovett,* 450 So.2d 116, 118 (Ala. 1984); *King v. Reid,* 428 So.2d 611, 615 (Ala. 1983); *Kirkland v. Kirkland,* 281 Ala. 42, 198 So.2d 771, 777 (1967); *Ex Parte Hanna,* 267 Ala. 527, 103 So.2d 720 (1958).

The petitioner thus asserts that this Court may in fact rule on the issue presented herein, under its ruling in *Barr v. City of Columbia,* 378 U.S. 146, 149 (1964). In *Barr,* this Court held that in order for a court to allow a procedural rule act as a bar to entertaining substantial federal questions, the court below must strictly and regularly follow that procedural rule, applying it evenly in all cases. 378 U.S. at 149. More recently, this Court has held that "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn,* 457 U.S. at 263. The *Hathorn* decision also counseled that if the current practice in applying a procedural rule is not evenly applied, past strict application will be overlooked. *Id.*

Thus, based on the established case law on this issue, the petitioner asserts that this Court may in fact properly assume jurisdiction over the issue of the Board's violation of the substantive due process rights of the petitioner, Alacare, in its award of a CON to Baptist, arbitrarily deviating from its established, fixed standards for deciding between competing CON applications.

II. THE DECISION OF THE CON REVIEW BOARD REGARDING THE ALACARE PROJECT WAS ARBITRARY AND CAPRICIOUS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Due Process Clause of the Fourteenth Amendment to the United States Constitution comprises a "general prohibition against arbitrary and unreasonable governmental action." *Thompson v. Gallagher*, 489 F.2d 443, 446 (5th Cir. 1973). The clause provides, in pertinent part, "[n]or shall any state deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. Due process principles constitute two different types of protection. Procedural due process ensures that the mechanism with which a citizen's property rights are challenged and sometimes deprived meet minimum prescribed standards. Substantive due process principles protect an individual's rights against arbitrary government action which encroaches upon a protected right by requiring that legislation must be rationally related to a legitimate government purpose. *See, Wolff v. McDonnell*, 418 U.S. 539 (1974); *Gallagher*, 498 F.2d at 447.

Alacare contends that the decision of the Board regarding the award of the CON to Baptist was a decision not reasonably justifiable or based upon fixed standards. The Board's decision was arbitrary and capricious, and therefore it violated principles of due process as guaranteed by the Fourteenth Amendment. Alacare's primary objection to the Board's decision lies with the Board's approval of Baptist's application over Alacare's application using inconsistent criteria as compared with contemporaneous decisions. It is the right to be compared fairly with its competitor by a Board using consistent, fixed standards that Alacare contends was violated by the Board.

A. Protected Interest at Stake

In order to demonstrate a violation of due process principles, an individual must first show evidence of a constitutionally protected interest in life, liberty, or property, and next that there exists some governmental deprivation of that interest. *Bank of Jackson County v. Cherry*, 980 F.2d 1362, 1366 (11th Cir. 1993) *cert. denied*, —— U.S. —— (1993).

The proposition that an individual possesses a right to due process in the deprivation of a property interest is long-standing in the area of due process jurisprudence. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). There is no precise model for a property interest, but such an interest extends beyond "actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*, 408 U.S. at 577.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), the Supreme Court said:

> The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law [or federal law, as the case may be], which cannot be removed except 'for cause". Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact."

(citations omitted). In *Thompson v. Bass*, 616 F.2d 1259, 1264 (1980), the former Fifth Circuit hammered home the proposition that a state employee "whose employment may be terminated only for cause has a prop-

erty interest [at stake] and is entitled to due process protection." The important element here is that if the individual can only be deprived of an interest *for cause*, a property right is created. That concept applies to all benefits that require "cause" before they can be removed by the government.

There is no contention by Baptist, nor any finding by the courts below, that Alacare has no property right at stake. The right to a hearing before one can be denied an interest to which one is entitled is a well settled notion. Here, the statutory scheme imposes a hearing for all entities interested in receiving the CON award; Alacare and Baptist were the two entities which participated in that hearing before the Board. As competing CON applicants, they are entitled to consideration before the Board. However, Alacare contends that it is entitled to something more as well, which is the right to a fair impartial hearing with fixed standards for approval, instead of the arbitrary, inconsistent standards used by this Board in denying Alacare's CON. That entitlement is the protected interest at stake in this cause; it was properly protected by the fair hearing officer upon appeal and within the scope of his authority when he properly granted Alacare the CON.

B. Arbitrary Government Deprivation of a Protected Interest

Due process principles command that no one shall be deprived of a liberty interest unless the government has borne the burden of producing the evidence and convincing a fact finder of guilt. *Speiser*, 357 U.S. at 526. The courts must look not only to the weight of the individual's interest, but must also look to see whether the nature of the interest is one contemplated by the "liberty or property" language of the Fourteenth Amendment. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The former Fifth Circuit most succinctly ruled upon the lack of consistent standards to which the petitioner objects in the case of *Frozen Foods Express, Inc, v.*

United States, 535 F.2d 877 (5th Cir. 1976). In that decision the court stated, as follows:

> . . . [L]aw does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. *There may not be a rule for Monday, and another rule for Tuesday, a rule for general application, but denied outright in a specific case.* 535 F.2d at 880 (citations omitted) (emphasis added).

In the final stage of the administrative agency's review, at the fair hearing, Hearing Officer Mark D. Wilkerson, properly and within the scope of his authority, concluded that the CON Review Board's decisions were unreasonable, arbitrary and capricious, and due to be set aside. A-62a. The fair hearing officer found that the hearing process failed to extract necessary evidence to support the Board's award of the CON to Baptist, since based on the record there was no evidence to support the finding that granting the Baptist application would improve the accessibility of service. A-62a. That single criterion, however, had it been found by the Board, still would not have been enough to justify the award of a CON to Baptist. Section 22-21-264 of the state code lists several factors which *must* be considered in the CON granting process, not the least of which is that of costs of services, expenditures, construction, and of overall financial feasibility of the proposal. § 22-21-264 *Ala. Code* (1975). A-79a. The hearing officer found that Alacare's charges were indeed lower than those of Baptist, and that fact distinguished the proceeding at issue from the three CON hearings held immediately prior. In the three prior hearings, the Board had most heavily considered cost factors in awarding the CONs, and in those three counties where Alacare also had competitive CON applications at stake, Alacare was denied CONs. Alacare was denied any of those CONs for allegedly not being the "most appropriate applicant" due to higher cost factors.

When inconsistent determinations are made by an administrative agency, an issue arises as to whether the

agency acted in an arbitrary and capricious manner. *See, Ex Parte Shelby County Medical Center, Inc.*, 564 So.2d 63 (Ala. 1990). In the instant case, the Board made three determinations regarding CONs on the same day that it made the determination here at issue. In those determinations, the Board used lower cost as its sole consideration in approving the CON applications in three other counties, in favor of other applicants. Curiously, in the present case, the Board denied Alacare's CON in favor of Baptist's CON where Alacare is clearly the more cost effective applicant. It is that act which Alacare contests, as the Board arbitrarily emphasized different criteria in one out of four hearings.

Baptist contested the final agency ruling, by Fair Hearing Officer Wilkerson, that the action of the fair hearing officer in denying Baptist's CON application and granting Alacare's CON was in fact arbitrary and capricious and due to be overturned. Alacare argued that the final agency ruling was correct and could not be overturned without a finding that the decision was clearly erroneous in view of the whole record. Alacare contended that the Board decision was clearly erroneous, as that decision did not take into account the lower proposed cost structure of Alacare, although it had considered that standard foremost in approving three other applicants competing against Alacare in different counties, all of whom had lower costs than Alacare.

The Board essentially ignored information regarding proposed charges and the comparative cost of the projects as between Alacare and Baptist, although those criteria were weighed exclusively in the granting of the three prior CONs. The Board cannot properly raise accessibility as its primary decisional factor in the comparison of Baptist and Alacare, where cost was the primary concern in three other decisions made the very same day. It is thus Alacare's contention that the Board violated Alacare's right to due process in its use of a different set of decisional criteria in that case, where in prior decisions the Board

consistently was concerned with cost factors. Had the Board considered and weighed cost factors heavily as per its usual procedure, the Alacare CON would have been granted as the more appropriate over the Baptist application.

The substantive protections afforded by the due process clause of the Fourteenth Amendment are designed to protect the individual from the "arbitrary exercise of the powers of government." *Hurtado v. California*, 110 U.S. 516 (1884). This Court has consistently and frequently affirmed the notion of substantive due process rights as a check of unreasonable government action. *See, Collins v. Harker Heights, TX*, 117 L.Ed.2d 261, —— U.S. —— (1992). As the *Frozen Foods* court stated, "an agency of government cannot deny one a benefit and then grant it to another on a case-by-case basis without applying standards, since to do so would be to act arbitrarily and capriciously." 535 F.2d at 880; *see also, Pritchett v. Nathan Rodgers Const. & Rlty. Co.*, 379 So. 2d 545 (Ala. 1980). That contention is the crux of the petitioner's argument.

Although the courts below held that the Board's initial denial of Alacare's CON was not an arbitrary or capricious decision, even the SHPA Rules seem to indicate a different result. Many of the rules appear to be weighted in favor of preference to existing facilities, particularly those which are also less costly and operate well. Section 410-1-6 concerns the review criteria and standards used by the Board in assessing which are "the most appropriate applicants" for CONs. § 410-1-6, SHPA Rules. A-88a. Section 410-1-6-.04(a) states that existing facilities may be afforded priority consideration in awarding CONs, as alternatives which would be less costly and/or more efficient than a proposed facility. SHPA Rules. A-88a. The rule at § 410-1-6-.04(b) discusses the weighing of lower costs versus greater accessibility. A-88a. SHPA rule § 410-1-6-.06(1)(e) states that the Board should consider the effect that the proposed facility might have on the

existing facility. A-89a. Rule § 410-1-6-.06(1)(e)(1) expressly states that expansion of existing facilities may be viewed with greater favor than establishment of new services; the considerations of accessibility and availability of services, although mentioned, take a secondary posture in this particular section. A-90a. And § 410-1-6-.17 adds the quality of past services as a consideration for the Board. A-91a.

Although petitioner Alacare is preferentially affected by all of its aforementioned rule sections, the Board still managed to alter the "fixed standards" to a degree which defeated every advantage that Alacare possessed over Baptist in the instant case. Since clearly the standards themselves did not change, petitioner contends that the emphasis which the Board placed upon those rule sections provided the force which altered the logical result of the CON award. And although the courts below held that it is within the Board's discretion to balance the competing interests, the arbitrary manipulation of laws to suit the interest of government violates the principles of the due process clause of the Fourteenth Amendment. As this Honorable Court recently reaffirmed, "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power. . . ." *Collins,* 117 L.Ed.2d at 274. (quoting *Deshaney v. Winnebago County Dept. of Social Services*).

If the Board were allowed to review each applicant for a CON based on a different set of priorities, the lack of uniformity alone would arguably create a constitutional violation, whereby similarly situated applicants would necessarily receive dissimilar treatment under differing standards of review. Were the Board given free reign to balance the criteria as it chose, the very situation that the substantive due process principles seek to avoid would arise, with a case-by-case inequitable, constitutionally infirm set of "standards" randomly applied by the state agency. Petitioner Alacare contends that this very situation has arisen in the present case, and that

the Board's arbitrary and capricious, haphazard application of the SHPA standards and state statutes violates the petitioner's interest in uniformly, fairly applied, reasonable standards for awarding CONs, as set out in the Alabama code, 22-21-260, *et seq.*, and the SHPA rules. The fair hearing officer acted within the proper exercise of his statutory and regulatory authority in his review of the Board's rulings. That fair hearing decision is the *final* decision of the agency and should be reinstated by this Court. § 22-21-275(14) *Ala. Code* (1975); § 410-1-8-.24, SHPA Rules (1994). *See*, A-86a and 93a, respectively.

CONCLUSION

For the foregoing reasons, the petitioner requests that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

ALVIN T. PRESTWOOD *
VOLZ, PRESTWOOD, HANAN
& SIZEMORE
350 Adams Avenue
Montgomery, AL 36104
(334) 264-6401
Attorney for Petitioner
* *Counsel of Record*

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